Filed 8/9/04 Marriage of Smith CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of CATHERINE and JERRY L. SMITH.	
CATHERINE SMITH, Respondent, v. JERRY L. SMITH, Appellant.	F043810 (Super. Ct. No. 574838) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Frank A. Hoover, Judge.

Jerry L. Smith, in pro. per., for Appellant.

No appearance for Respondent.

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STATEMENT OF THE CASE

On July 20, 2000, respondent Catherine Smith (Catherine) filed a petition for dissolution of marriage in Kern County Superior Court (case No. 574838).

On August 8, 2000, appellant Jerry Smith (Jerry) filed a response to Catherine's petition.

On September 7, 2000, the court conducted a hearing on order to show cause for child custody and visitation and ordered joint legal custody with physical custody to Catherine and specific visitation to Jerry.

On November 7, 2000, the court conducted a continued hearing on order to show cause, ordered Jerry effective October 1, 2000, to pay $885 per month in child support and $605 per month in spousal support, and further ordered Jerry to maintain health insurance on the parties' minor children. The court also ordered Jerry to contribute to Catherine's attorney fees and to maintain insurance on the GMC vehicle in his possession.

The court further noted that Jerry had incorporated a family business in violation of an automatic restraining order and without the knowledge or consent of Catherine. The court ordered that Jerry could continue to maintain control of the family businesses but directed him to provide monthly accounting reports to Catherine.

On November 8 and November 22, 2000, Jerry substituted Gary A. O'Neil for Janice Banducci as his attorney of record.

On April 5, 2001, the parties and their counsel met and conferred but Jerry failed to provide any documentation concerning his business operations or to produce a preliminary declaration of disclosure.

On April 19, 2001, the court continued a first mandatory settlement conference to allow time for Jerry's counsel to complete a preliminary declaration of disclosure and service of previously-ordered business information.

On May 24, 2001, the court continued a second mandatory settlement conference due to Jerry's failure to provide documents to Catherine pursuant to court orders or to serve his preliminary declaration of disclosure.

On July 1, 2001, Jerry cancelled medical insurance on the parties' minor children in violation of the court's orders.

On July 19, 2001, the court conducted a third mandatory settlement conference, Jerry again failed to serve his preliminary declaration of disclosure or to provide previously-ordered documentation, and the court ordered issue sanctions imposed if Jerry failed to comply within 10 days.

On July 23, 2001, Jerry substituted out his attorney, Gary A. O'Neil, as counsel of record and began representing himself in propria persona.

On September 6, 2001, Jerry violated the automatic restraining order by changing the beneficiary of the parties' life insurance to the name of his girlfriend.

On September 13, 2001, Jerry substituted Leon Harris III, as his counsel of record. The court granted Harris a continuance to November 13, 2001, to prepare for trial.

On September 19, 2001, Jerry's girlfriend recorded a "claim of lien" in the sum of $103,000, alleging she provided services to Jerry's business, Smith's Technical Services.

On October 18, 2001, Jerry served an order to show cause for modification of child and spousal support with hearing set for November 13, 2001, the date of trial. Jerry failed to include proof of income and failed to provide previously-ordered documents and reports.

On November 13, 2001, the date set for trial, the court determined the matter was not ready to proceed to trial because Jerry failed to provide previously ordered accounting records or a proposed property distribution. The court also declined to hear Jerry's order to show cause because of his failure to provide income information. The court ordered Jerry to submit information to Catherine's counsel by December 17, 2001, continued the trial date, and reset the matter for a fourth mandatory settlement conference on January 17, 2002.

On December 17, 2001, Jerry failed to serve the documentation ordered by the court on November 13, 2001.

On January 7, 2002, Jerry failed to file and serve a required settlement conference statement and proposed property distribution.

On January 14, 2002, Catherine filed an order to show cause for control of a family business known as Cherokee Production.

On January 16, 2002, Jerry filed and served his settlement conference statement and proposed property distribution but failed to provide previously-ordered documentation and financial information.

On January 17, 2002, the court conducted a fourth mandatory settlement conference, imposed $1,000 in sanctions against Jerry, and directed Jerry's pleadings be stricken and the matter proceed by default if he failed to pay the sanctions and provide previously-ordered documents by January 23, 2002. The court bifurcated the issue of Catherine's order to show cause for a hearing to be held on January 23, 2002.

On January 23, 2002, Jerry failed to pay the monetary sanctions and produce the previously-ordered documents. The court proceeded on a default basis with respect to the bifurcated issue of the business known as Cherokee Production and took the matter under submission.

On January 28, 2002, the court filed a minute order awarding Catherine the business known as Cherokee Production and directed Jerry to provide her with all records and information associated with the business within eight hours of receipt of the court's order.

On January 30, 2002, Jerry provided Catherine with keys to the leases and copies of outstanding business expenses but no documentation supporting the expenses or any other financial records. Catherine provided Jerry's counsel with a list of items necessary to operate the business and extended time for compliance with the court's order to the end of business on February 4, 2002.

On February 4, 2002, Jerry provided Catherine with copies of portions of the business check register, some bank statements, and some miscellaneous items but did not supply all records ordered by the court.

On April 30, 2002, the court conducted a fifth mandatory settlement conference but Jerry failed to provide the remainder of the previously-ordered records and to pay the sanctions. The court set trial on the remaining issues for June 19, 2002, with no further continuances.

On May 7, 2002, the court granted the motion of Leon R. Harris III to be relieved as Jerry's counsel of record.

On June 14, 2002, Catherine's counsel filed a trial brief in the superior court.

On June 19, 2002, trial commenced before the Honorable Frank A. Hoover, judge of the superior court. Jerry appeared in propria persona. The court heard the sworn testimony of the parties, granted Catherine's petition for dissolution of marriage, granted Jerry visitation at the discretion of the minor children, and continued the matter to July 23, 2002, for further hearing.

On July 23, 2002, the court continued the matter to August 7, 2002.

On July 30, 2002, the Kern County Department of Child Support Services filed a notice substituting itself as payee for all of Jerry Smith's current support payments and arrearages (Fam. Code, § 4506.3).

On August 7, 2002, the court conducted a continued hearing and trial on reserved issues, received certain items into evidence, and continued the matter to August 19, 2002, due to insufficient time. On August 19, the court continued the matter to August 28, 2002.

On August 28, 2002, the court conducted a continued hearing, directed the parties to submit written arguments and updated income and expense declarations by October 1, 2002, and took the matter under submission.

On October 1, 2002, Jerry filed a written argument and an income and expense declaration.

On October 3, 2002, Catherine filed a closing brief.

On November 25, 2002, the court filed a minute order acknowledging receipt of the briefs and declaring the cause submitted.

On January 8, 2003, the court filed a written decision stating in relevant part:

"I. OPENING OBSERVATIONS

"On January 23, 2002, after repeated requests, demands, and ultimatums, the Court awarded as 'issue sanctions[,]' the business known as Cherokee Production to Petitioner [Catherine].[1]

"During the trial of this matter, the Court permitted Respondent [Jerry] ample opportunity to present any evidence on the issue of the dissolution of marriage.

"Respondent presented volumes of evidence, much of which was considered by the Court without requiring Respondent to lay an adequate foundation.

"It is the Court's opinion that Respondent cannot separate in his mind the only issues in the dissolution. He persists in presenting evidence or innuendo that, while married, Petitioner cheated him out of his money. Respondent gives the impression of someone presenting a belief of embezzlement to a detective. The court is not a detective and in a trial for dissolution of marriage must make an even distribution of community assets. Much of that task was rendered impossible by the actions of the Respondent. In fact, so convinced of Petitioner's "theft" from him, Respondent "stole" much of the assets and income from Cherokee Production back from her.

"Having fired or frustrated 3 attorneys, Respondent proceeded in pro per. The Court was indulgent with Respondent and in spite of that Respondent's closing argument consists of the same sort of inference, innuendo, and inadmissible opinion. An accurate value of much of the 'community property' has been rendered impossible by actions of Respondent.

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[1] In the trial court proceedings Catherine was referred to as petitioner and Jerry as respondent.

"II. SPOUSAL SUPPORT

"The marriage was one of more than 27 years[;] the Court reserves jurisdiction on the issue of spousal support.

"III. CHILD SUPPORT, CUSTODY & VISITATION

"Have already been separately decided upon, no evidence was presented and the Court orders that support, custody, and visitation remain as previously ordered.

"IV. DIVISION OF COMMUNITY PROPERTY

"1. The business known as Cherokee Production previously awarded to Petitioner, is confirmed as her sole and separate property. No value is needed, however, the Court accepts Petitioner's value of -$6,364.00 (negative value). [¶] All [liens] filed by Respondent against Cherokee Production and/or its leasehold interests, wells, equipment, or personal property are declared void and invalid.

"2. All bills, invoices or taxes due from the operation of Cherokee Production from January 1, 2002 through January 23, 2002, are confirmed as Respondent's obligations.

"3. The entity known as Smith's Technical Services or Smith's Technical Services, Inc., is awarded to Respondent as his sole and separate property. It has value according to Respondent as $0.00. The Court does not accept his valuation; Respondent incorporated this entity after separation in violation of the automatic property restraints. The Court assigns a value to the various items of personal property of $55,000. The Court finds Respondent created this corporation to keep Petitioner from much of the community property and further as an entity into which he and his girlfriend could transfer assets.

"4. LIFE INSURANCE

"Life insurance with Pacific Life awarded to Petitioner.

"5. IRA ACCOUNTS

"IRA Vanguard accounts to the natural children of the parties.

"6. MISCELLANEOUS

"a. All household furniture, furnishings, fixtures are confirmed as Petitioner's separate property except as she may give or transfer to

Respondent by making arrangements for him to come and pick it up. Respondent to submit a list of miscellaneous personal property, clothes, and effects and submit it to Ms. Dennis [Catherine's counsel] by January 15, 2003.

"b. The 1992 Chevy Blazer is confirmed as Petitioner's sole and separate property.

"c. The 1995 GMC ½ ton truck, 1984 Ford F-250 truck, 1992 Ford Club Cab ½ ton truck, and the 2 utility trailers are confirmed as Respondent's sole and separate property.

"d. Taxes from the operation of the business are to be split between the parties until they become the separate property of one of the parties.

"V. ATTORNEY FEES

"Respondent to pay $5,000 to Petitioner's attorney, Terry Dennis.…

"Counsel for Petitioner to draw up Final Decree and Orders."

On February 7, 2003, Jerry filed an order to show cause for modification of spousal support, alleging Catherine's monthly income was substantially higher than his and claiming Catherine had not returned his personal property despite a proper request.

On February 27, 2003, Catherine filed a responsive declaration noting "[t]here is no current Order for spousal support and therefore none to terminate. The Judgment merely reserved jurisdiction over the issue of spousal support." Catherine also addressed the 15 items of personal property as to which Jerry asserted a claim.

On March 5, 2003, the court conducted a hearing on the order to show cause, heard the testimony of the parties, and took the matter under submission.

On March 6, 2003, the court filed a minute order denying the motion for spousal support finding no change in circumstances. The court granted Jerry's motion for return of his Army uniform and cement mixer. The court also directed Catherine to make copies of photographs and videos of Jerry's ancestors and minor children upon his prepayment of applicable copying expenses. On April 25, 2003, the court filed formal findings and order after hearing to that effect.

On March 21, 2003, Jerry substituted attorney Paige Etcheverry-Barnes as his counsel of record.

On April 29, 2003, the court filed a judgment of dissolution of marriage and judgment on reserved issues finding both parties to be fully self-supporting, ordering Jerry to pay $885 in monthly child support and $8,850 in child support arrears and $6,050 in spousal support arrears (both exclusive of interest), granting Catherine sole custody of the parties' two minor children with visitation to Jerry as mutually arranged. The court also awarded separate property and divided community assets and obligations, including those relating to business entities. The court further retained jurisdiction to make orders and determinations necessary and appropriate to enforce the terms of the judgment.

On May 13, 2003, Jerry filed a notice of intention to move for new trial on the ground of irregularity of the proceedings of the court and failure of Catherine and her counsel to allow him to review the judgment prior to filing and entry.

On May 15, 2003, Jerry filed a notice of motion to set aside judgment and for new trial.

On May 19, 2003, Jerry filed a notice of motion to set aside judgment and motion for reconsideration.

On May 21, 2003, the court filed a judgment on the bifurcated issue of the valuation and division of the parties' community business entities, Cherokee Production and Smith's Technical Services. The court entered sanctions against Jerry, awarded Cherokee Production and its oil and gas leases and other property to Catherine as her sole and separate property, and ordered Jerry to turn over to her all records of the business. The court set the matter for further mandatory settlement conference on any remaining issues.

On June 19, 2003, the court conducted a hearing on Jerry's motions for reconsideration and new trial, established a briefing schedule, and indicated it would take the matter under submission on the pleadings to be filed.

On June 20, 2003, Catherine filed a responsive declaration and points and authorities in opposition to Jerry's motion for reconsideration or set aside the court's April 25, 2003, order.

On the same date, Catherine filed a responsive declaration and points and authorities in opposition to Jerry's motions to set aside judgment and for new trial.

On June 25, 2003, Catherine filed another responsive declaration and points and authorities in opposition to Jerry's motions for reconsideration and to set aside the order of April 25, 2003.

On the same date, Catherine filed yet another responsive declaration and points and authorities in opposition to Jerry's motions to set aside judgment and for new trial.

On June 30, 2003, the court denied Jerry's motions for new trial and for reconsideration, stating:

> "The Court carefully listened and examined the evidence in this case. Any defects in absolute accuracy are the product of the Respondent and his unstoppable efforts to frustrate both the legal process and the Petitioner.
>
> "Despite orders he defies and sanctions he ignores, the Respondent pushes on with yet another motion. The evidence was presented. The Respondent, after three lawyers left his side, was given ample opportunity to present his case. All he presented was a jumble of inconclusive and inadmissible conjecture. The Respondent did not meet any burden of proof on his theories of the Petitioner[']s treachery. The court finds his testimony and evidence to be incredible.
>
> "On the other hand, the Petitioner testified and presented evidence which was logical and believable. The exact truth of the matter is that the court believed the Petitioner.
>
> "There is no basis in law or logic for a new trial. The motion for a new trial is denied. [¶] The motion for reconsideration is also denied."

On July 17, 2003, the Kern County Department of Child Support Services filed a notice of assigned support and substitution of payee, directing Jerry to make all current support payments and arrearage payments to the department.

On August 5, 2003, the court filed a judgment of dissolution (status only) terminating the parties' marriage effective June 19, 2002.

On September 2, 2003, Jerry filed a notice of appeal "from the Judgment of Dissolution of Marriage on Reserved Issues, entered April 29, 2003, as [a] result of denying a Notice of Motion To Set Aside Judgment and For New Trial, filed on May 15, 2003, which was held on June 30, 2003 …."[2]

On September 29, 2003, Jerry filed a notice of pending action in the Kern County Superior Court "to avoid the [sale] of the property located at … Greenview Lane., Bakersfield, CA 93308, until after the decision of the appeal."

On December 15, 2003, Jerry filed a petition for writ of mandate or other appropriate relief in this court and the petition was subsequently recaptioned as "Appellant's Opening Brief."

On January 16, 2004, the Clerk/Administrator of this court notified Catherine "if respondent's brief is not on file or good cause for relief shown within 15 days after the date of this notice, the appeal may be submitted for decision upon the record and the appellant(s) opening brief." Catherine nevertheless did not file a respondent's brief.[3]

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[2] An appeal may be taken from a judgment or an order made appealable by the provisions of the Family Code. (Code Civ. Proc., § 904.1, subd. (a)(1), (10).) A judgment is not appealable unless it is final in the sense that it decides the rights and duties of the parties and terminates the litigation. Where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory. (*In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 689.) The April 29, 2003, judgment of dissolution in the instant case decided the rights and duties of the parties, although it also reserved jurisdiction over unknown debts and claims. Thus, it was appealable.

[3] If a defaulting respondent neither files a brief nor applies for an extension of time within a 15-day grace period, the appellate court will decide the appeal on the record, the opening brief, and any oral argument by appellant. (Cal. Rules of Court, rule 17(a)(2); 2 Eisenberg et al., Cal Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 9:278, p. 9-56.10.) In such circumstances, we examine the record on the basis of the

STATEMENT OF FACTS[4]

Appellant Jerry L. Smith and respondent Catherine Smith were married on June 3, 1972. They had two children, William (born January 1986) and Christopher (born May 1989). The family resided in a 1,346 square foot home in the Highland Knolls area of Bakersfield. Catherine worked part-time (17 ½ hours per week) in the Fruitvale School District office as a payroll person. Jerry operated Cherokee Production Company, an oil production company that handled the Harris/Wible and H.O. (Harley O.) Strickler leases on section 23, township 30 south, range 28 east, in the Mountain View Field of Kern County. At the end of year 2000, these leases produced approximately 175 barrels of oil per month from five of eight existing wells. Catherine served as bookkeeper for Cherokee Production Company during the course of her marriage to Jerry.

Catherine and Jerry separated in September 1999, after a marriage of 27 years and three months. Catherine filed a petition for dissolution of marriage on July 20, 2000, and served Jerry with the petition, summons, and preliminary declaration of disclosure on

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appellant's brief and reverse only if prejudicial error is found. (*Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7.)

4 An appellant's opening brief must provide a summary of the significant facts limited to matters in the record. (Cal. Rules of Court, rule 14(a)(2)(C).) Each brief must support any reference to a matter in the record by a citation to the record. (Cal. Rules of Court, rule 14(a)(1)(C).) The summary of significant facts means something more than just the facts favorable to an appellant. (*Manteca Veal Co. v. Corbari* (1953) 116 Cal.App.2d 896, 898 [construing terminology in predecessor rule].) At the same time, a resume of all the evidence is not what is intended by the Rules on Appeal. (*Kritt v. Athens Hills Development Co.* (1952) 109 Cal.App.2d 642, 644.) If a filed brief does not comply with California Rules of Court, rule 14 (governing contents and form of briefs), the reviewing court may, on its own motion and without notice, disregard the noncompliance. (Cal. Rules of Court, rule 14(e)(2)(C).) As a consequence of the minimal factual presentation in the instant case, we have most reluctantly ferreted out a statement or summary of the material facts from the record on appeal. (*Lord v. Henderson* (1951) 105 Cal.App.2d 426, 444.)

July 27, 2000. Jerry filed a written response to the petition on August 8, 2000. In September 2000, Jerry incorporated Smith's Technical Services, Inc. That business, with a gross fair market value of $100,000,[5] consisted of such material assets as downhole tools (packers), a tractor, two large Sea-Train storage buildings, an Echo Meter, and approximately $10,000 worth of miscellaneous tools and goodwill. Commencing in January 2001, Jerry issued a number of job invoices bearing the name of S&D Consultant Services and charging "Cherokee Production Co DBA Smith Technical Services" for labor, material, and services expended upon the Harris/Wible and HO Strickler leases.

On April 29, 2003, the court filed a judgment of dissolution on reserved issues, stating in relevant part:

> "**AWARD OF SEPARATE PROPERTY**
> **"AND DIVISION OF COMMUNITY ASSETS AND OBLIGATIONS**
>
> "A. The Court confirms the following separate assets and obligations and awards the following community assets and obligations to the Petitioner as her sole and separate property:
>
> "1. The residence located at … Greenview Lane, Bakersfield, California.… [¶]…[¶]
>
> "2. All household furniture, furnishing, fixtures, appliances and personal effects in her possession. Petitioner may give or transfer items to the Respondent as she desires by making arrangements for him to come and pick it up. Respondent was to submit a list of miscellaneous personal property, clothes, and effects to Ms. Dennis by January 15, 2003. To the extent the list actually includes any personal property, clothes or effects, they will be transferred to the Respondent as set forth under paragraph B.2., below.
>
> "3. 1992 Chevrolet Blazer.

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[5] Catherine indicated the $100,000 gross fair market value for Smith's Technical Services, Inc. in her community and quasi-community property declaration. Jerry indicated a $3,500 gross fair market value for Smith's Technical Services, Inc. in his corresponding declaration.

"4. 1977 GMC A-Frame Truck, license #1Z15552 ….

"5. Vanguard Asset Allocation Fund IRA ... shall be awarded 100% to the parties[']minor children ... with Petitioner as custodian and trustee for the minor children.

"5. Pacific Life Insurance policy ….

"6. Vanguard Wellesley Income Fund ... is awarded 100% to the Petitioner as her sole and separate property.

"7. Bank of America Visa Account ….

"8. All right, title and interest in and to Petitioner's California P.E.R.S. retirement benefits.

"9. Lladro statues.

"B. The Court confirms the following separate assets and obligations and awards the following community assets and obligations to the Respondent as his sole and separate property;

"1. All household furniture, furnishings, fixtures, appliances and personal effects in his possession.

"2. Respondent was to have submitted a list of miscellaneous personal property, clothes, and effects to counsel for Petitioner by January 15, 2003. Only those items that are personal property, clothes, and effects are awarded to the Respondent. To the extent that they are in the possession or under the control of the Petitioner, they shall be turned over to him.

"a. Item #1, Photos. These are not personal property, clothes or effects. They are [photos] of the family of the minor children. Respondent may prepay to have copies made.

"b. Item #2, antique corner cabinet. This is not the separate or personal property of the Respondent.

"c. Item #3, set of china. Only a portion of the china is that which the respondent received from his great grandmother's estate during the marriage. That portion of the china will be turned over to the Respondent.

"d. Item #4, antique pump oregon. Petitioner is unaware of what an 'ANTIQUE PUMP OREGON' is. If this is the antique pump organ, it is not the separate or personal property of the Respondent.

"e. Item #5, Army Uniform. This is the separate property of the Respondent and will be turned over to him.

"f. Item #6, Laterals. These were purchased during the marriage and are a part of the assets of Cherokee Production, previously awarded to the Petitioner.

"g. Item #7, Cement Mixer. This is the separate property of the Respondent and will be turned over to him.

"h. Item #8, Sears Radial arm saw. This is not the separate or personal property of the Respondent.

"i. Item #9, Cutting Torches and Bottles. These are community items which are a part of the assets of Smith's Technical Services, awarded to the Respondent.

"j. Item #10, Lincoln Electric Welder. The parties do not own a Lincoln Electric Welder and it is not the separate or personal property of the Respondent.

"k. Item #11, Craftsman Table Saw. This is not the separate or personal property of the Respondent.

"l. Item #12, Skil Worm Saw. This was a Christmas gift to the Petitioner from the Respondent and the minor children. It is the separate property of the Petitioner, not the Respondent.

"m. Item #13, One-half of the pictures of the children. These will be copied at the expense of the Respondent.

"n. Item #14, Copies of home movies of the children, at the expense of the Respondent.

"o. Item #15, Lifetime warranty on the 1984 Ford, valued by the Respondent at $8,000. This item was previously turned over to the Respondent and is not in the possession of the Petitioner.

"3. 1984 Ford F-250 truck.

"4. 1992 Ford Club Cab ½ ton truck.

"5. 2 Utility trailers.

"6. 1995 GMC ½ ton truck.

"7. Bank of America Visa ... paid off by Petitioner. Respondent refused to close the account and the account is awarded to him as his sole obligation.

"8. Washington Mutual Bank ... which was incurred after the date of separation solely by the Respondent.

"9. SalomonSmithBarney Citibank Visa Card ... which was opened after the date of separation solely by the Respondent, and Account … which was a joint account and is now closed.

"10. Safeway Los Angeles Federal Credit Union Visa ... which was opened after the date of separation solely by the Respondent.

"11. Safeway Los Angeles Federal Credit Union Visa ... which was a joint account. Personal charges were made after the date of separation by the Respondent. That account is now $0 and was closed by the Respondent and Petitioner's name removed when he assumed sole liability.

"12. CitiBank U.S.A. credit card ... opened solely by the Respondent after the date of separation.

"13. Citibank MasterCard . . ..

"14. Wells Fargo MasterCard . . ..

"15. Texaco Credit Card . . ..

"16. Chase Manhattan (Wal-Mart) . . ..

"BUSINESS ENTITIES

"C. The entity known as Smith's Technical Services and/or Smith's Technical Services, Inc. is awarded to the Respondent as his sole and separate property. It has value according to the Respondent of $0.00. The Court does not accept this valuation; Respondent incorporated this entity after separation and after service of the Petition for Dissolution in violation of the automatic property restraints. The Court assigns a value to the various items of personal property associated with this business of $55,000. The Court finds that Respondent created this corporation to keep Petitioner from much of the community property and further as an entity into which he and his girlfriend, Doddie Ferrell, could transfer assets.

"D. The entity known as Cherokee Production and all oil and gas leases associated with Cherokee Production were previously awarded to the Petitioner as her sole and separate property, as well as any other property used in the operation of the business and the oil and gas leases. Respondent

is ordered to execute and deliver to Petitioner quitclaim deeds ... confirming transfer to Petitioner of all of his interest in all oil and gas leases associated with Cherokee Production . . ..

"E. The Court finds that all liens filed or recorded by the Respondent and/or his girlfriend, Doddie Ferrell and/or under the name of S & D Consulting Services against Cherokee Production and/or its leasehold interests, wells, equipment, or personal property, including but not limited to those certain 'Claims of Lien' recorded on or about June 17, 2002, as Document No. 0202096521, and on or about September 17, 2001 as Document No. 0201135666, in the Office of the Recorder of Kern County, California, are void, invalid and unenforceable. The Respondent failed to provide any evidence of the validity of the claims or liens, or to overcome the evidence submitted by the Petitioner that the claims of work performed by the Respondent's girlfriend, Doddie Ferrell dba S& D Consulting Services were anything more than a means to transfer the assets of Cherokee Production to Respondent's girlfriend. Specifically, the court finds void, invalid and unenforceable the various 'Claims of Lien' filings against the Harris/Wible and HO Strickler Leases . . . as well as any other claims of liens filed against any oil and gas leases owned by or associated with Cherokee Production or Petitioner.

"F. Prior to June, 2000, the parties had the joint use, possession and control of Cherokee Production and shall each be liable for one-half of any taxes from the operation of Cherokee Production during that time period. Respondent shall be liable for any claims of Doddie Ferrell and/or S&D Consulting Services as the Respondent and his girlfriend, Doddie Ferrell, sought to transfer the assets of Cherokee Production to avoid division as community property.

"G. The Respondent had the exclusive use, possession, and control of Cherokee Production from June, 2002 until January 23, 2002 and had the exclusive use of all assets and income. Respondent failed to provide documents, as previously ordered, that would allow the Petitioner to reconstruct what occurred with the business during this time period. Respondent shall be solely responsible for all bills, invoices, royalties or taxes from the operation of Cherokee Production up to and including January 23, 2002. The Petitioner shall be solely responsible for all bills, invoices, royalties or taxes from the operation of Cherokee Production after January 23, 2002.

"H. Respondent had the exclusive use, possession and control of Smith's Technical Services from June, 2000 and of Smith's Technical Services, Inc.

since its incorporation, and shall be solely responsible for debts and obligations of both entities from June, 2000."

Jerry unsuccessfully challenged the foregoing judgment via a variety of pleadings. In his May 15, 2003, motion to set aside judgment and for new trial, Jerry declared Catherine's counsel failed to provide the proposed judgment for his review and approval. In his accompanying memorandum of points and authorities, he maintained (1) the judgment was taken against him through his excusable mistake, inadvertence, surprise, and excusable neglect; (2) he was entitled to a fair adversary hearing; the trial court had the power to set aside a judgment based upon fraud; (3) a new trial was appropriate because irregularity in the proceedings prevented a fair trial and materially affected his substantial rights; and (4) there should be an equal division of community property.

In his May 19, 2003, motion to set aside and motion for reconsideration, Jerry declared the trial judge did not require Catherine to provide an actual and updated income and expense declaration at the March 5, 2003, hearing and did not take into consideration her current financial status at the time of the hearing. He also declared the April 25, 2003, findings and order after hearing were never served upon him. In the accompanying memorandum of points and authorities, Jerry maintained (1) reconsideration was in order because evidence of Catherine's income was not available at the hearing, and (2) the April 25, 2003, order was entered against Jerry through his mistake, inadvertence, surprise, and excusable neglect.

On June 30, 2003, the court denied Jerry's various requests by minute order noting, among other things, "[a]ny defects in absolute accuracy are the product of the Respondent and his unstoppable efforts to frustrate both the legal process and the Petitioner."

DISCUSSION

On appeal Jerry contends (1) the court "erred in granting" his motion to vacate/set aside the judgment; (2) he is entitled to a fair adversary hearing; (3) there should be an

equal division of community property; and (4) there should be a new trial granted because of the irregularity in the proceedings.

We initially note a judgment or order of the trial court is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) All presumptions and intendments are in favor of supporting the judgment or order appealed from. An appellant has the burden of showing reversible error. In the absence of such showing, the judgment or order appealed from will be affirmed. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373; *Hibernia Sav. Etc. Soc. v. Ellis Estate Co.* (1933) 132 Cal.App. 408, 412.) All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based. Hence, it devolves upon an appellant to affirmatively show the existence of the error upon which he or she asks for a reversal. (*Scott v. Hollywood Park Co.* (1917) 176 Cal. 680, 681; *Dahlberg v. Dahlberg* (1927) 202 Cal. 295, 297.)

The burden rests upon the party complaining not only to show error but also to show the error is sufficiently prejudicial to justify a reversal. (*Coleman v. Farwell* (1929) 206 Cal. 740, 741.) Error must be affirmatively shown. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) Further, when an appellant decides to represent himself in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys. This holds true in both the appellate courts and the trial courts. (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193.) A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial court and would be unfair to the other parties to litigation. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.)

Under California law, it is the duty of a trial judge to see that a cause is not defeated by the mere inadvertence of a lay litigant. However, such litigant is restricted to the same rules of procedure as are required of those qualified to practice before our courts. A litigant has a right to act as his or her own attorney, but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to

practice law before our courts. Otherwise, ignorance is unjustly rewarded. (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1055-1056.) A layperson with resources who insists upon the privilege of representing himself or herself must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse. The fact a layperson elects to represent himself does not excuse him from a failure of proof of his cause of action. While a trial judge has a duty to see a cause is not defeated by mere inadvertence, the trial judge is not required to act as counsel for a litigant in the presentation of his or her evidence. (*Lombardi v. Citizens Nat. Trust etc. Bank* (1955) 137 Cal.App.2d 206, 208-210.)

We address each of Jerry's contentions in turn.

A. <u>Failure to "Grant" the Motion to Vacate/Set Aside Judgment</u>[6]

Jerry argues:

> "The court has inherent power to set aside a judgment obtained through fraud perpetrate[d] upon it. [¶]...[¶] 'Smith' is the victim of the 'Real Party In Interest [Catherine][.]' After years of maintaining his family and business and letting 'Real Party In Interest' work as an employee for him, 'Real Party In Interest' knowing the nature of all assets and debts of this marriage was able to obtain her wishes and desires and walk away with all community assets leaving 'Smith' with all debts and no community assets as shown in the judgment entered April 29, 2003, on reserved issues."

Code of Civil Procedure section 473, subdivision (b) states in relevant part:

> "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable

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6 Jerry phrases his first contention as error in the trial court's grant of his motion to vacate/set aside. However, the true thrust of his contention is that the trial court erroneously *failed to grant* such motions.

time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.…"

Ordinarily, a party seeking relief under Code of Civil Procedure section 473 from a judgment, order, or other proceeding has the double burden of showing (1) diligence in making the motion after discovering his or her own mistake, and (2) a satisfactory excuse for the occurrence of that mistake. The court must generally consider the facts and circumstances of a case to determine whether the party was diligent in seeking relief and whether the reasons given for the party's mistake are satisfactory. (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196.)

A motion seeking relief under Code of Civil Procedure section 473 is addressed to the sound discretion of the trial court and its decision will not be overturned on appeal absent a clear showing of abuse of discretion. That discretion is not a capacious or arbitrary discretion but an impartial discretion, guided and controlled in its exercise by fixed legal principles. Such discretion is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice. A judgment may also be set aside if it was procured by extrinsic fraud. (*Rivercourt Co. Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480-1481.) Where two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court. (*Eigner v. Worthington, supra,* 57 Cal.App.4th at p. 196, fn. 6.) Reversal of an order denying relief is appropriate where the effect of the order is to defeat, rather than advance, the ends of justice. (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343-1344.)

A judgment of a trial court is presumed correct on appeal and all intendments and presumptions are indulged in favor of its correctness. The burden of demonstrating error rests upon the appellant. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.) This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error. (*State Farm Fire & Casualty*

Co. v. Pietak (2001) 90 Cal.App.4th 600, 610.) An appellant assumes the burden of showing reversible error by an adequate record. A judgment or order is presumed correct unless the appellant has affirmatively demonstrated otherwise. (*Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1210; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.)

In the instant case, Jerry summarily suggests a fraud was perpetrated, that he was somehow Catherine's "victim," and that she walked away with all community assets, leaving him with all debts and no community assets. In framing this brief argument, appellant fails to cite to the record or to explain precisely how Catherine purportedly obtained the lion's share of community assets. Where an appellant asserts a point but fails to support it with reasoned argument and authority, a reviewing court treats the point as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) In an era of scarce judicial resources, we cannot develop an appellant's arguments for him. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

Jerry's contention must be deemed waived.

B. <u>Fair Adversary Hearing</u>

Jerry further contends:

> "'Smith['] does not have to demonstrate with certainty that a different result would obtain occur on retrial of this matter. Rather, he must show facts indicating a sufficiently meritorious claim to entitled him to a fair adversary hearing. (<u>In re Marriage of Park</u> (27 Cal.3d 337, 346, citing <u>Olivera v. Grace</u> (1942) 19 Cal.2d 570, 79.)
>
> "'Smith' in his declaration informed the court he was never given a copy of the proposed judgment and that everything in the judgment was not a court decision, but that of the 'Real Party In Interest' [Catherine] prepared by her counsel, Terry Dennis, giving all assets to 'Real [Party] I[n] Interest.' In fact the judgment was submitted to the court without my signature, stating 'failed to sign or object' which was written in by the Law Office of Terry Dennis. I did not sign or object to this judgment because it was never sent or presented to me for review as I informed the court previously. The court ignored these facts."

Code of Civil Procedure section 663 states in relevant part:

"A judgment ... when based upon a decision by the court ... may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

"1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . .."

Code of Civil Procedure section 664 states in relevant part:

"... If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until entered."

California Rules of Court, rule 232(e) states:

"**[Preparation and filing of written judgment when statement of decision not requested]** If a statement of decision is not requested or has been waived and a written judgment is required, the court shall prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days after expiration of the time for requesting a statement of decision or time of waiver. The court may notify a party to prepare, serve and submit the proposed judgment to the court within 10 days. Any party affected by the judgment may, within 10 days after service of the proposed judgment, serve and file objections thereto.

"The court shall, within 10 days after expiration of the time for filing objections to the proposed judgment or, if a hearing is held, within 10 days after the hearing, sign and file its judgment. The judgment so filed shall constitute the decision upon which judgment shall be entered pursuant to section 664 of the Code of Civil Procedure."

Where no statement of decision is requested, all intendments will favor the trial court's ruling and it will be presumed on appeal that the trial court found all facts necessary to support the judgment. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 104.)

In a letter dated March 10, 2003, and served upon Catherine's counsel, Terry Dennis, on March 17, 2003, Jerry stated in relevant part:

"IN[]REGARDS TO THE APPOINTMENT MADE BY YOU IN COURT, I WILL NOT BE ABLE TO COME TO YOUR OFFICE. [¶] I DO NOT TRUST YOU OR YOUR CLIENT TO BE ALONE WITH BOTH OF YOU, SO ANY PAPERS YOU NEED SIGNED WITH REGARDS TO THE HOME … GREENVIEW LN, BKERS, CA 93301 OR THE LIFE INSURANCE POLICIES WITH PACIFIC LIFE. SEND THEM BY US MAIL AND I WILL BE HAPPY TO SIGN THEM AND SEND THEM BACK AFTER I HAVE LEGAL SERVICES REVIEW THEM.…"

In a letter dated March 19, 2003, attorney Dennis wrote to Jerry in relevant part:

"Pursuant to the Order of Judge Hoover, Ms. Smith delivered the items of personal property to my office for exchange with you on March 18, 2003 as ordered. You were ordered to appear at 5:00 p.m. that date to review and sign any and all documents necessary for execution of the Judgment and any other documents necessary to carry out the property transfer as set forth in the Judgment. This was as a condition of the turnover of various property to you. You failed to appear at my office.

"I am enclosing a copy of the proposed Judgments of January 23, 2002 and August 6, 2002 and the proposed Order After Hearing of March 5, 2003 for your review and approval. If I have not received the signed documents or written objections to the documents back in my office by March 28, 2003, the Judgment and Order will be submitted to the court for signature and filing without your approval."

Catherine stated in relevant part in her responsive declaration dated June 19, 2003:

"1. There are several flaws in Respondent's claims that he 'had never seen the proposed judgment or been asked to review it[.]'

"A. At the hearing on March 5, 2003, the court Ordered Mr. Smith to appear at the offices of my attorney on March 18, 2003 to review and sign any and all documents necessary for execution of the Judgements and any other documents necessary to carry out the property transfers set forth in the Judgments. This was ordered by the court due to Mr. Smith's continued failure to co-operate or to abide by previous court Orders. The Order provided that he could retrieve his agreed upon personal property upon his signing of the documents.… He failed to do so.…

"B. On March 19, 2003, after the Respondent failed to appear at my attorney's office, a copy of the Judgments and the proposed March 5, 2003 Order After Hearing were mailed to the Respondent.… The Judgment and Order were not submitted to court until significantly longer than the stated 10 day review period, in order to provide Respondent with sufficient time

> to review the documents. He knew the documents were ready and awaiting his signature on March 18, 2003, yet he surprisingly made no attempt to contact my attorney to find out why they did not arrive after he requested they be mailed to him, obviously because he already had them in his possession."

An appellant's burden to affirmatively demonstrate error remains the same whether or not the respondent files a brief on appeal. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.) From the foregoing evidence, the trial could reasonably conclude that Jerry had ample opportunity to examine and review the proposed judgment and, for whatever reason, failed to do so in a timely manner. As the trial court observed in its minute order of June 30, 2003: "Any defects in absolute accuracy are the product of the Respondent and his unstoppable efforts to frustrate both the legal process and the Petitioner." Jerry's claims must be rejected.

C. Equal Division of Community Property

Jerry contends:

> "'Smith' has lost all rights to the community assets along with being left with almost all community debts, as ordered in judgment dated April 29, 2003, on the matter of reserved issues, of which a large portion of the assets and debts were favorable to 'Real Party in Interest', Catherine Smith.
>
> "'Smith' is only requesting of the court to review the irregularity in the proceedings which prevented 'Smith', to receive his equal division of the community assets and debts of this marriage."

Family Code section 2550 states:

> "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally."

Under Family Code section 2550, the trial court is generally required to divide the community estate of the parties equally. Section 2550 provides some protection for a

creditor of one spouse only. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 668.) In satisfying the mandate of section 2550, the court must distribute both the assets and the obligations of the community so that the residual assets awarded to each party after deduction of the obligations are equal. To the extent that community debts exceed total community and quasi-community assets, the excess of debt shall be assigned as the court deems just and equitable, taking into account factors such as the parties' relative ability to pay. (Fam. Code, § 2622, subd. (b).) (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 924.)

The family law court possesses broad discretion to determine the manner in which community property is awarded in order to accomplish an equal allocation. (*In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 880.) On review, all conflicts in the evidence are drawn in favor of the judgment. The reviewing court may not reweigh the evidence or determine credibility. (*In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 71.) When appellants challenge the sufficiency of the evidence, all material evidence on the point must be set forth and not merely their own evidence. Failure to do so amounts to waiver of the alleged error and we may presume the record contains evidence to sustain every finding of fact. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.)

In the instant case, Jerry recites few—if any—facts underlying the allocation of community assets. Instead, he repeatedly insists an irregularity occurred and that he ended up "with almost all community debts" while Catherine ended up with "a large portion of the assets." However, Jerry again fails to explain how this alleged inequality occurred and ignores the grid chart attached to the trial court's decision of January 8, 2003. That chart clearly reflects the allocation of $64,801.00 in assets to Catherine, $65,000 in assets to Jerry, and $18,000 in assets (the Vanguard Wellesley Income Fund) to Catherine as custodian/trustee for the parties' minor children. Jerry has failed to affirmatively demonstrate error and his challenge to the division of community property must be rejected.

D. Motion for New Trial

Jerry lastly contends a new trial should be granted because of the irregularity in the proceedings, i.e., the dissolution proceeding allegedly left him "with no community assets just community debts."

Code of Civil Procedure section 657 states in relevant part:

> "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
>
> "1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶]...[¶]
>
> "3. Accident or surprise, which ordinary prudence could not have guarded against.
>
> "4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶]...[¶]
>
> "6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.
>
> "7. Error in law, occurring at the trial and excepted to by the party making the application."

A motion for new trial is an application for a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. (Code Civ. Proc., § 656.) The proceedings on a motion for new trial are strictly statutory and the procedure for seeking relief must conform strictly to the statutory mandate. (*People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 601.) A trial judge is accorded wide discretion in ruling on a motion for new trial and the exercise of this discretion is given great deference on appeal. Nevertheless, on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as affecting the rights of a party, including an order denying a new trial. In our review of

such order denying a new trial, we must fulfill our obligation of reviewing the entire record so as to make an independent determination whether any error was prejudicial. The trial court is bound by the rule of article VI, section 13 of the California Constitution, that prejudicial error is the basis for a new trial and there is not discretion to grant a new trial for harmless error. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161.) An order denying a motion for a new trial is not directly appealable but may be reviewed on appeal from the judgment. The trial court is accorded such wide discretion in ruling on a motion for a new trial that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*Price v. Giles* (1987) 196 Cal.App.3d 1469, 1472.)

The question whether, under all the circumstances, an irregularity has materially affected substantial rights and prevented a fair trial is addressed to the discretion of the trial court. The trial court, having heard and seen the witnesses and having knowledge of circumstances which may not be produced in the record, is in a better position than the appellate court to determine its effect. No accurate classification of such irregularities can be made. However, an overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct, may be regarded as an irregularity. (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182.)

As noted above, prejudicial error is the basis for a new trial. Article VI, section 13 of the California Constitution states in relevant part:

> "No judgment shall be set aside, or new trial granted, in any cause, on the ground of ... the improper admission or rejection of evidence ..., or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

A miscarriage of justice occurs when it appears a result more favorable to the appealing party would have been reached in the absence of the alleged errors. The burden is on the appellant in every case to show that error has resulted in a miscarriage of justice. Further,

appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945.)

In the instant case, Jerry essentially asserts a miscarriage of justice but fails to delineate how the trial court purportedly allocated virtually all of the community assets to Catherine and virtually all of the community debts to him. In response to Jerry's motion for new trial, the superior court observed in its minute order denying relief:

> "… The Respondent, after three lawyers left his side, was given ample opportunity to present his case. All he presented was a jumble of inconclusive and inadmissible conjecture. The Respondent did not meet any burden of proof on his theories of the Petitioner[']s treachery. The court finds his testimony and evidence to be incredible."

Jerry's appellate challenge to the denial of his new trial motion must be rejected in light of his failure to show a violation of the right to a fair and impartial trial and given the trial court's wide discretion in ruling on such a motion in the first instance.

DISPOSITION

The judgment is affirmed.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
LEVY, J.

_____
GOMES, J.